



Overview of the Air Carrier Access Act

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May 19, 2009

Congressional Research Service

7-5700

www.crs.gov

RL34047

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 19 MAY 2009		2. REPORT TYPE		3. DATES COVERED 00-00-2009 to 00-00-2009	
4. TITLE AND SUBTITLE Overview of the Air Carrier Access Act				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Congressional Research Service, Library of Congress, 101 Independence Ave, SE, Washington, DC, 20540-7500				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 11	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Summary

The Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, prohibits discrimination by air carriers against individuals with disabilities. Public attention regarding an airplane passenger who traveled while infected with Extensively Drug Resistant Tuberculosis (XDR-TB) in 2007 raised questions regarding the ACAA's requirements and guarantees. Additionally, public concern about the 2009 influenza A(H1N1) outbreak may increase congressional interest in air travel regulations. This report briefly discusses the ACAA's statutory provisions, accompanying regulations, relevant judicial opinions, and legislation in the 110th Congress.

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Background

Congress passed the Air Carrier Access Act (ACAA) in 1986,¹ with several goals. First, Congress intended to address the “unique difficulties” faced by individuals with disabilities, who often had no way to predict the extent of a given airline or flight crew’s accommodation.² Second, Congress intended the ACAA to overrule a Supreme Court case, *Department of Transportation v. Paralyzed Veterans of America (PVA)*,³ in which the Court held that certain nondiscrimination regulations then in effect⁴ could not be enforced against commercial airlines.⁵ Finally, Congress also intended to balance protecting individuals with disabilities from discrimination, on one hand, and the need to ensure general passenger safety, on the other.⁶

The inquiry regarding the extent of protections under the ACAA is timely given public concern in 2007 about a man infected with XDR-TB who traveled on several passenger airplanes before he was placed in isolation and public concern in 2009 about the influenza A(H1N1) outbreak. This report discusses ACAA requirements and regulations, including regulations regarding airplane passengers with communicable diseases.⁷ It will also briefly discuss S. 2554, 110th Congress, and H.R. 5129, 110th Congress, which proposed to amend the ACAA to provide aggrieved individuals with a private right of action, attorneys’ fees, expert fees, and the costs of the action.

The Nondiscrimination Requirement and Exceptions

The ACAA prohibits discrimination by air carriers against “otherwise qualified individual[s]” on the basis of disability.⁸ The statutory language regarding the scope of “disability” was the same under the ACAA as under the Americans with Disabilities Act (ADA)⁹ prior to the enactment of the Americans with Disabilities Amendment Act on September 25, 2008.¹⁰ Specifically, a person

¹ Air Carrier Access Act of 1986, 100 Stat. 1080 (1986) (current version at 49 U.S.C. § 41705).

² S.Rept. 99-400, at 2 (1986).

³ 477 U.S. 597, 611 (1986).

⁴ In 1982, the predecessor to the Federal Aviation Administration (FAA) promulgated regulations prohibiting discrimination by air carriers against individuals with disabilities. 55 Fed. Reg. 8009. These regulations derived legal authority from Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which the PVA Court interpreted as extending only to entities directly receiving federal financial assistance. 477 U.S. at 604.

⁵ S. Rept. 99-400, at 1-2 (1986); see also 132 Cong. Rec. S11,784 (daily ed. Aug. 15, 1986) (statement of Sen. Dole) (“The legislation ... overturns the recent Supreme Court decision in the case of [PVA].”).

⁶ *Id.* (“[The ACAA] does not mandate any compromise of existing ... safety regulations.”)

⁷ For more information on XDR-TB and related legal and public health issues, see CRS Report RL34144, *Extensively Drug-Resistant Tuberculosis (XDR-TB): Emerging Public Health Threats and Quarantine and Isolation*, by Kathleen S. Swendiman and Nancy Lee Jones. For more information on the 2009 influenza A(H1N1) outbreak and related legal issues, see CRS Report R40560, *The 2009 Influenza A(H1N1) Outbreak: Selected Legal Issues*, coordinated by Kathleen S. Swendiman and Nancy Lee Jones.

⁸ 49 U.S.C. § 41705 (2008).

⁹ P.L. 110-325 (2008). For a more detailed discussion of the ADA Amendments Act, see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

¹⁰ 42 U.S.C. §§ 12101 *et seq.* (2008). At least one court has used the same analysis for “disability” under the ACAA as (continued...)

is an “individual with a disability” under the ACAA if the individual (1) “has a physical or mental impairment that substantially limits one or more major life activities,” (2) “has a record of such an impairment,” or (3) “is regarded as having such an impairment.”¹¹ Under the regulations,¹² such individuals are “qualified” individuals with disabilities if they (1) take steps to avail themselves of services offered by air carriers, (2) make good faith efforts to obtain tickets for air transportation, or (3) purchase or possess valid tickets for air transportation and meet reasonable contracts of carriage.¹³ Prior to enactment of the ADA Amendments Act, courts typically found that individuals met this “qualified” requirement if they also satisfied the “individual with a disability” requirement.¹⁴

The ACAA’s statutory language is brief, leaving implementation to the Department of Transportation (DOT). The department originally promulgated regulations to implement the ACAA on March 6, 1990.¹⁵ Under the regulatory framework, air carriers violate the ACAA’s nondiscrimination provision if they discriminate against an individual with a disability, “by reason of such disability, in the provision of air transportation.”¹⁶

Additionally, air carriers may not require passengers to accept special services.¹⁷ DOT’s goal for this provision was to ensure that individuals with disabilities are not treated differently than other passengers.¹⁸ In *Deterra v. America West Airlines*, a federal district court noted that asking a person utilizing a wheelchair to advance to the front of a ticket line when he had not requested special service could constitute discriminatory conduct under the regulations.¹⁹

(...continued)

the ADA case law provided prior to enactment of the Americans with Disabilities Amendments Act. Curtis Edmonds, *When Pigs Fly: Litigation Under the [ACAA]*, 78 N.D. L. Rev. 687, 698 (2002) (citing *McIntyre v. City & County of S.F.*, No. C-01-1244-CRB, 2001 WL 1679154 at 3 (N.D. Cal. Oct. 9, 2001)). Note, however, that the regulatory definition of “individual with a disability” under the ACAA includes individuals with merely temporary impairments. 14 C.F.R. § 382.3 (2009). This provision was not included in the original definition of “disability” under the ADA, but the ADA Amendments Act of 2008 classified “an impairment that is episodic or in remission” as a disability “if it would substantially limit a major life activity when active.” P.L. 110-325, § 4(a).

¹¹ 49 U.S.C. § 41705(a) (2008).

¹² On May 13, 2008, the regulations were revised. See 73 Fed. Reg. 27614, 27655. These revisions became effective on May 13, 2009. Many of the revisions retained the original language of the regulations but moved the language to a different subsection.

¹³ 14 C.F.R. § 382.3 (2009).

¹⁴ See Curtis Edmonds, *When Pigs Fly: Litigation Under the [ACAA]*, 78 N.D. L. Rev. 687, 698 (2002).

¹⁵ 55 Fed. Reg. 8008.

¹⁶ 14 C.F.R. § 382.11(a)(1) (2009). In the context of refusing service, note that carriers violate the ACAA if they deny access “because the person’s disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience” others (14 C.F.R. § 382.19(b) (2009)) or if they limit the number of individuals with disabilities allowed on any given flight (14 C.F.R. § 382.19(c) (2009)).

¹⁷ 14 C.F.R. § 382.11(a)(2) (2009).

¹⁸ 55 Fed. Reg. 12336, 12337 (April 3, 1990).

¹⁹ 226 F.Supp. 2d 298, 299 n.6 (D. Mass. 2002).

Exceptions

The regulations provide two major exceptions to the general nondiscrimination requirement. First, carriers may refuse to serve individuals with disabilities “on the basis of safety.”²⁰ Second, carriers may refuse to serve individuals with disabilities when doing so would violate “FAA [Federal Aviation Administration] or TSA [Transportation Security Administration] requirements or applicable requirements of a foreign government.”²¹ If a carrier denies service to an individual with a disability under either of these exceptions, it must specify its reason in writing.²²

Impacted Air Carriers

The ACAA impacts nearly all air carriers that transport passengers. Air carriers are defined as “U.S. ... or foreign citizen[s] ... [that undertake], directly or indirectly, or by a lease or any other arrangement, to engage in air transportation.”²³ It is clear from the ACAA’s legislative history²⁴ that the ACAA applies to both government and commercial air carriers. Additionally, in *Bower v. FedEx*, the Sixth Circuit held that the ACAA applied to a company that routinely allowed employees to ride as passengers in its cargo planes.²⁵

The original version of the ACAA exempted foreign air carriers. However, in 2000, Congress passed a law amending the ACAA such that it now applies to foreign air carriers.²⁶ On May 13, 2008, the regulations were revised to include foreign air carriers,²⁷ and the new provisions went into effect on May 13, 2009.²⁸ Foreign air carriers now are required to comply with the ACAA for flights “that begin or end at a U.S. airport.”²⁹

²⁰ 14 C.F.R. §382.19(c) (2009).

²¹ *Id.* Also, persons with communicable diseases who “pose a serious threat to the public” have been listed on the public health Do Not Board list that is managed by the Centers for Disease Control and Prevention and the U.S. Department of Homeland Security. See Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention, Federal Air Travel Restrictions for Public Health Purposes – United States, June 2007-May 2008 (2008), <http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5737a1.htm>.

²² 14 C.F.R. §382.19(d) (2009).

²³ 14 C.F.R. § 382.3 (2009). “Air transportation” is defined as “interstate or foreign air transportation, or the transportation of mail by aircraft, as defined in 49 U.S.C. 40102.” *Id.*

²⁴ See, e.g., S.Rept. 99-400, at 1-2 (1986) (referring to the ACAA’s purpose as extending to air carriers as a whole, distinct from the small subset of carriers that receive direct federal financial assistance).

²⁵ 96 F.3d 200, 204 (6th Cir. 1996) (interpreting the definition of “air carrier” to include carriers who transport property by aircraft across state lines).

²⁶ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, P.L. 106-181, § 707(a)(2), 114 Stat. 61 (2000).

²⁷ See 73 Fed. Reg. 27614, 27645.

²⁸ *Id.*

²⁹ 14 C.F.R. § 382.7(b) (2009). A “flight” is a “continuous journey in the same aircraft or with one flight number that begins or ends at a U.S. airport.” *Id.* Foreign carriers are not subject to ACAA requirements for flights “between two foreign points, even with respect to flights involving code-sharing arrangements with U.S. carriers.” 14 C.F.R. § 382.7(c) (2009). Additionally, they are not subject to ACAA requirements for charter flights “from a foreign airport to a U.S. airport ... [that returns] to a foreign airport ... [and does not] pick up any passengers in the U.S.” 14 C.F.R. § 382.7(d) (2009).

Application in the Context of Communicable Diseases

The ACAA contains no statutory reference to communicable diseases, but the regulatory text specifically addresses them.³⁰ Additionally, the regulatory definition of “individual with a disability” appears to include individuals with communicable diseases.³¹ Similarly, courts generally accept communicable diseases as falling within the scope of “disability” under the ADA if the diseases meet the same parameters that other physical or mental impairments must satisfy.³² Although no federal court has reached the issue, it follows that courts would likely reach similar conclusions under the ACAA.

The regulations prohibit various actions by carriers against individuals with communicable diseases. Namely, a carrier may not “(1) [r]efuse to provide transportation to the passenger; (2) [d]elay the passenger’s transportation ... ; (3) [i]mpose on the passenger any condition, restriction, or requirement not imposed on other passengers; or (4) [r]equire the passenger to provide a medical certificate.”³³ However, an exception applies when “the passenger’s condition poses a direct threat.”³⁴ The regulations define “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”³⁵

Carriers have discretion in determining whether a given passenger poses a “direct threat.” The carrier must make an “individualized assessment, based on reasonable judgment ... to ascertain: (i) [t]he nature, duration, and severity of the risk; (ii) [t]he probability that the potential harm to the health and safety of others will actually occur; and (iii) [w]hether reasonable modifications of policies, practices, or procedures will mitigate the risk.”³⁶ However, note that within the scope of their discretion, carriers must choose the “least restrictive response” from the passenger’s point of view.³⁷ For example, a carrier should not “refuse transportation to the passenger if ... [it] can protect the health and safety of others by means short of a refusal.”³⁸

³⁰ 14 C.F.R. § 382.21 (2009).

³¹ 14 C.F.R. § 382.3 (2009) (referring to “a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment”).

³² See *Bragdon v. Abbott*, 524 U.S. 624, 631–42 (1998) (analyzing the plaintiff’s HIV infection under the same framework as applies to other physical and mental conditions; holding that the plaintiff’s HIV infection constituted a disability under the ADA because it is a physical impairment affecting a major life activity). For more information regarding judicial treatment of communicable diseases under the ADA, see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by Nancy Lee Jones.

³³ 14 C.F.R. § 382.21(a) (2009).

³⁴ 14 C.F.R. § 382.21(a) (2009).

³⁵ 14 C.F.R. § 382.3 (2009).

³⁶ 14 C.F.R. § 382.19(c)(1) (2009).

³⁷ 14 C.F.R. § 382.19(c)(2) (2009).

³⁸ *Id.*

Accessibility Requirements for Qualified Individuals

The Department of Transportation regulations require most air carriers³⁹ to take specific actions in order to fulfill the ACAA's broad nondiscrimination requirement. Note that these requirements are minimum standards only.

Aircraft Accessibility

Aircraft must conform to multiple accessibility requirements under the regulations. First, "aircraft with 30 or more passenger seats on which passenger aisle seats have armrests" must be "equipped with movable aisle armrests on at least one-half of the aisle seats in rows in which passengers with mobility impairments are permitted to sit under FAA or applicable foreign government safety rules."⁴⁰ Second, each aircraft with 100 or more passenger seats must offer priority space in its cabin for storing at least one folding wheelchair.⁴¹ Third, aircraft with "more than one aisle in which lavatories are provided shall include at least one accessible lavatory."⁴² Finally, aircraft with more than 60 passenger seats⁴³ providing one or more accessible lavatories must provide an "on-board wheelchair" for passengers' use.⁴⁴

Attendants, Equipment, and Service Animals

Generally, air carriers may not require that an individual with a disability travel with an attendant.⁴⁵ However, a carrier may require that an individual travel with an attendant if one of the following applies and the carrier determines that an attendant's assistance is "essential for safety": (1) the passenger will travel in a stretcher or incubator; (2) the passenger is unable to comprehend or respond appropriately to safety instructions; (3) the passenger has a "mobility impairment so severe that the person is unable to physically assist in his or her own evacuation of the aircraft"; or (4) the passenger has both severe hearing and vision impairments and "cannot establish some means of communication with carrier personnel."⁴⁶

Air carriers must allow individuals with disabilities to travel with service animals.⁴⁷ In addition, carriers must "permit the service animal to accompany the passenger with a disability at any seat

³⁹ The requirements in this section do not apply to "indirect" air carriers, 14 C.F.R. § 382.7(f) (2009), where an "indirect" carrier is a "person not directly involved in the operation of an aircraft who sells air transportation services to the general public other than as an authorized agent of a carrier." 14 C.F.R. § 382.3 (2009).

⁴⁰ 14 C.F.R. § 382.61(a) (2009).

⁴¹ 14 C.F.R. § 382.67(a) (2009).

⁴² 14 C.F.R. § 382.63(a) (2009).

⁴³ "The Aerospatiale/Aeritalia ATR-72 and the British Aerospace Advanced Turboprop (ATP), in configurations having between 60 and 70 passenger seats, are exempt from this requirement." 14 C.F.R. § 382.65(a) (2009).

⁴⁴ *Id.*

⁴⁵ 14 C.F.R. § 382.29(a) (2009).

⁴⁶ 14 C.F.R. § 382.29(b) (2009).

⁴⁷ 14 C.F.R. § 382.117(a) (2009). For a more detailed discussion of the ADA and service animals, see CRS Report (continued...)

in which the person sits, unless the animal obstructs an aisle or other area that must remain unobstructed to facilitate an emergency evacuation.”⁴⁸ Also, carriers must accept service animal identification cards, tags, and even “credible verbal assurances” from qualified individuals as proof that a given animal is a “service animal.”⁴⁹

Similarly, airlines must allow qualified individuals with disabilities to bring ventilator or respirator equipment into the airplane cabin and use those devices during flights “operated on aircraft originally designed to have a maximum passenger capacity of more than 19 seats.”⁵⁰ Additionally, airlines must permit qualified individuals to stow assistive devices “in designated priority storage areas or in overhead compartments or under seats,” including “(1) [m]anual wheelchairs ... ; (2) [o]ther mobility aides, such as canes ... , crutches, and walkers; and (3) [o]ther assistive devices for stowage or use within the cabin.”⁵¹ These devices must be “consistent with FAA, PHMSA [Pipeline and Hazardous Materials Safety Administration], TSA, or applicable foreign government requirements concerning security, safety, and hazardous materials with respect to the stowage of carry-on items,”⁵² and a carrier “must not count assistive devices ... toward a limit on carry-on baggage.”⁵³

Seat Assignments, Boarding and Deplaning Assistance, and Advance Notice

The regulations require all carriers to assist individuals with disabilities with boarding and deplaning if either the individual has requested such service or the carrier has offered such service and the individual agreed to receive it.⁵⁴ Also, carriers may not require individuals with disabilities to sit in particular seats or refuse to seat them in any seat on the basis of disability.⁵⁵ However, a narrow exception applies when refusing to accommodate a passenger in a particular seat is necessary in order for the carrier to comply “with FAA or applicable foreign government safety requirements.”⁵⁶

Carriers generally may not require individuals with disabilities to provide advance notice of the fact that they are flying.⁵⁷ However, various exceptions apply. Specifically, a carrier may require up to 48 hours of advance notice of a passenger’s disability if that passenger plans to carry or

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RS22930, *The Americans with Disabilities Act (ADA) Proposed Regulations*, by Nancy Lee Jones.

⁴⁸ 14 C.F.R. § 382.117(b) (2009).

⁴⁹ 14 C.F.R. § 382.117(d) (2009).

⁵⁰ 14 C.F.R. § 382.133(a) (2009).

⁵¹ 14 C.F.R. § 382.121(a) (2009).

⁵² *Id.*

⁵³ 14 C.F.R. § 382.121(b) (2009).

⁵⁴ 14 C.F.R. § 382.95(a) (2009).

⁵⁵ 14 C.F.R. § 382.87(a) (2009).

⁵⁶ *Id.*

⁵⁷ 14 C.F.R. § 382.25 (2009); 14 C.F.R. § 382.27(a) (2009).

utilize certain equipment on the flight or seeks certain accommodations enumerated in the regulations.⁵⁸

Security Screening

The regulations require that individuals with disabilities be required to undergo no more security screening procedures than individuals without disabilities.⁵⁹ Likewise, security personnel must conduct screening of individuals with disabilities in the same manner in which they conduct screening of individuals without disabilities.⁶⁰ However, they may examine an assistive device that might, “in their judgment,” conceal a weapon or other prohibited item.⁶¹

Enforcement

In the most recent cases, two federal circuits have held that private individuals have no ability to sue airlines for discrimination under the ACAA.⁶² Instead, those courts have suggested that the ACAA merely gives individuals the ability to complain to the Department of Transportation (DOT) and then to file petitions for review with federal circuit courts if DOT fails to investigate individual complaints.⁶³ These holdings limit individuals’ ability to enforce the ACAA through the federal courts. Instead, individuals often must rely on DOT to enforce complaints against air carriers. Furthermore, some experts have argued that DOT’s enforcement ability is relatively weak, in part because it handles enforcement through its enforcement office rather than through its office of civil rights.⁶⁴ DOT has indicated that it has investigated numerous ACAA complaints, sometimes seeking millions of dollars in civil penalties as a result of ACAA violations.⁶⁵

⁵⁸ Specific accommodations include “(1) [c]arriage of an incubator; (2) [h]ook-up for a respirator ... ; (3) [a]ccommodation for a passenger ... in a stretcher; (4) [t]ransportation for an electric wheelchair” (if the aircraft has fewer than 60 seats); “(5) [p]rovision of hazardous materials packaging for batteries or other assistive devices ... ; (6) [a]ccommodation for a group of ten or more qualified individuals with a disability, who make reservations and travel as a group; ... (7) [p]rovision of an on-board wheelchair” (if the aircraft has more than 60 seats and no accessible lavatory); “(8) [t]ransportation of an emotional support or psychiatric service animal in the cabin; (9) [t]ransportation of a service animal on a flight segment scheduled to take 8 hours or more; [and] (10) [a]ccommodation of a passenger who has both severe vision and hearing impairments.” 14 C.F.R. § 382.27(c) (2009).

⁵⁹ 14 C.F.R. § 382.55(b)(1) (2009).

⁶⁰ *Id.*

⁶¹ 14 C.F.R. § 382.55(b)(2)(i) (2009).

⁶² See *Love v. Delta Airlines*, 310 F.3d 1347, 1359 (11th Cir. 2002) (holding that “Congress did not intend to create a private right of action in a federal district court to vindicate the ACAA’s prohibition against disability-based discrimination on the part of air carriers”) and *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1265 (10th Cir. 2004) (stating the court’s conclusion that “ACAA establishes certain administrative remedies but not a private right of action”). Although prior cases, see, e.g., *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989), had held that the ACAA creates a private right of action, cases since the Supreme Court decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), have reached the opposite conclusion.

⁶³ See, e.g., *Love*, 310 F.3d at 1356.

⁶⁴ See, e.g., National Council on Disability, *Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress* (1999), <http://www.ncd.gov/newsroom/publications/1999/aca.htm>.

⁶⁵ See, e.g., News Release, U.S. Department of Transportation, DOT Enforcement Office Charges Northwest Airlines With Discrimination Against Passengers With Disabilities (2001), <http://www.dot.gov/affairs/dot9001.htm>.

Legislation

The Civil Rights Act of 2008, S. 2554 and H.R. 5129, was introduced in the 110th Congress and proposed, in part, to amend the ACAA to provide for a private right of action. As noted previously, judicial decisions under the act have held that individuals have no ability to sue the airlines individually but must rely on the DOT to enforce complaints. The bills indicated that Congress disagreed with the judicial interpretations and noted that “[t]he absence of a private right of action leaves enforcement of the ACAA solely in the hands of the Department of Transportation, which is overburdened and lacks the resources to investigate, prosecute violators for, and remediate all of the violations of the rights of travelers who are individuals with disabilities.”⁶⁶ Although both S. 2554 and H.R. 5129 were referred to committee, the 110th Congress did not enact this legislation.

As of the date of this report, the 111th Congress has not introduced any similar legislation.

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Acknowledgments

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⁶⁶ S. 2554, § 401, 110th Cong.; H.R. 5129, § 401, 110th Cong.